

STATE OF MICHIGAN
COURT OF APPEALS

BOARD OF TRUSTEES OF THE CITY OF
FLINT RETIREMENT SYSTEM,

Plaintiff-Appellant,

v

CITY OF FLINT,

Defendant-Appellee.

UNPUBLISHED
February 24, 2005

No. 250273
Genesee Circuit Court
LC No. 01-071712-CZ

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Plaintiff, the Board of Trustees of the City of Flint Employees Retirement System (the Board), appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant, City of Flint (Flint), in this declaratory judgment action. We affirm.

This case has its genesis in the Board's retention of an attorney to provide legal services. The attorney began serving as counsel for the Board in 1987 pursuant to a retainer agreement.¹ In June 2001 a Flint retiree filed a class action suit against Flint, the Board, and eight trustees. In a September 2001 letter to the chair of the Board, Karen McDonald Lopez, Flint's chief legal officer, explained that Flint's city charter provided that Flint's chief legal officer is the legal

¹ The retainer agreement between the Board and the attorney provided for a:

Retainer fee of One Thousand dollars (\$1,000) per month plus costs. This fee would represent payment for services rendered to a monthly maximum of ten (10) hours. Services in excess of ten hours will be billed at the rate of Sixty five dollars (\$65.00) per hour.

advisor to the Board and in that capacity she would be coordinating the matter regarding the class action suit.²

In October 2001 the Board filed this declaratory judgment action requesting the trial court to find that the Board has the right to retain independent legal counsel. The trial court concluded that the “chief legal officer of the City of Flint is the attorney advisor for the retirement board on all matters except where there is a conflict of interest which relates to those issues necessary to the conduct of the system, which I interpret to be the essential functions of the Board.” The trial court entered an order reflecting this decision on July 30, 2003.

The narrow legal issue framed by the parties is whether the Board has the right under MCL 38.1133(4) to independently retain private legal counsel to represent the retirement system. Statutory interpretation is a question of law that this Court reviews *de novo*. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). If the language of a statute is clear, no further analysis is necessary or allowed. *Id*.

The City of Flint Employee Retirement System was established pursuant to the Public Employee Retirement System Investment Act, MCL 38.1132 *et seq.* MCL 38.1133(4) provides, in part:

An investment fiduciary may use a portion of the income of the system to defray the costs of investing, managing, and protecting the assets of the system; *may retain investment and all other services necessary for the conduct of the affairs of the system*; and may pay reasonable compensation for those services . . . (Emphasis added.)

Section 35-8 of Flint’s ordinance vests in a board of trustees the authority to administer, manage, and properly operate the retirement system. Section 35-13(d) of the ordinance provides that Flint’s chief legal officer is the legal advisor to the Board.³ Section 35-13(h) provides that “The Board of Trustees may employ such professional and other services as are required for the proper operation of the retirement system.”

In *Board of Trustees of the Policemen and Firemen Retirement System of Detroit v Detroit*, 143 Mich App 651; 373 NW2d 174 (1985), this Court addressed legal issues that are nearly on point with the issues in the present case. The *Policemen and Firemen* case arose when the board of trustees of the Policemen and Firemen Retirement System of the City of Detroit hired independent legal counsel to pursue an action against the city for illegally refusing to make

² Lopez informed the retained attorney in December 2001 that he was no longer authorized to represent the Board in any capacity in which a conflict of interest did not exist between the Board and Flint.

³ Section 4-601 of Flint’s charter sets forth the responsibilities and duties of the chief legal officer. In pertinent part, the charter provides: “The chief legal officer shall be the attorney for the City and shall direct the management of all legal matters in which the City is interested.”

mandatory contributions to the retirement system. Relying on a city charter provision stating that the city corporate counsel must represent all city administrative agencies or shall appoint independent counsel in the event of a conflict of interest, the city challenged the Board's authority to retain independent counsel. *Id.* at 654-655.

The issue as framed by this Court was "whether . . . MCL 38.1132 *et seq.* . . . authorized the boards of trustees of all public retirement systems to independently retain private legal counsel." *Id.* at 654. This Court found the language of MCL 38.1133(4), as quoted above, unambiguous and held that "the statute clearly states that the investment fiduciary may retain services necessary for the conduct of the affairs of the system." *Id.* at 655. This Court also found that the statute and charter in that case conflicted "since the statute provides that plaintiff may choose its own legal counsel and the charter provides that defendants shall choose plaintiff's legal counsel." *Id.* This Court concluded that the statute controlled over the city charter and that the board of trustees was permitted to retain independent legal counsel when necessary for the conduct of the affairs of the system. *Id.* at 656. See also *Rental Property Owners Ass'n v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997).

In *Policemen and Firemen*, this Court looked to the nature of the claims involved in the underlying action to determine whether it would be appropriate for the city attorney to represent the retirement system or for the city to appoint counsel to represent the system. This Court stated:

The facts of the instant case clearly show that such independent legal service is necessary. The city has repeatedly failed timely to make large contributions to the retirement system. We feel that there would be an obvious conflict of interest if the city represented the retirement system or appointed counsel for the retirement system. . . . The city may neglect its alleged duty to represent the retirement system, especially when the system is claiming that the city owes millions of dollars. In fact, in defense of the underlying action, the city claimed that it had no legal obligation whatsoever to pay the contributions on the date they were due. Under these circumstances, we do not feel that the retirement system would be properly represented by the city's corporate counsel or by other counsel appointed by the corporate counsel. We believe that independent legal counsel was necessary for the conduct of the affairs of the system. [*Id.* at 655.]

This Court examined the facts of the underlying lawsuit to determine whether the city should represent the retirement system or appoint counsel or whether independent legal counsel retained by the board was necessary for the conduct of the affairs of the system. This Court found that the facts of the case and the conflict of interest presented clearly created a necessity for independent legal counsel. By defining the proper inquiry as "whether the city corporate counsel should represent the retirement system or whether independent legal counsel was necessary," *id.* at 655, this Court implied that a city's representation of a retirement system or a city's appointment of counsel pursuant to a local ordinance or charter does not violate MCL 38.1133(4) absent a finding that independent legal services are necessary to the conduct of the

retirement system in a particular situation.⁴

Applying the plain language of MCL 38.1133(4), and considering *Policemen and Firemen*, we conclude that the Board may retain independent legal services in those circumstances where such counsel is “necessary for the conduct of the affairs of the retirement system.”⁵ MCL 38.1133(4) is not an open authorization to the board to retain counsel. If the Legislature intended to give the boards of retirement systems unfettered discretion to retain independent legal counsel under any circumstances it would not have included the language “where necessary for the conduct of the affairs of the retirement system.” Whether independent legal counsel is necessary for the conduct of the affairs of the retirement system at issue is a determination to be made by the Board on a case-by-case basis.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens

⁴ In light of this conclusion, the remainder of the issues raised by the Board need not be addressed.

⁵ Here, even though the trial court granted summary disposition in favor of Flint after concluding that the Board could retain independent legal services only if a conflict existed between the Board and Flint, the trial court did not actually determine that no conflict existed as this action was simply a declaratory judgment action.